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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 610

IRVING STRAUSS, HAROLD SOLODAR, HARRY SCHILLING, CHARLES KRAUSS, and SAMUEL W. BEHRMAN,
Appellants,

v.

THE UNIVERSITY OF THE STATE OF NEW YORK, ALEXANDER J. ALLEN, JR., GEORGE HOPKINS BOND, JOHN F. BROSNAN, EDGAR W. COUPER, EDWARD R. EASTMAN, CAROLINE WERNER GANNETT, JACOB L. HOLTZMANN, W. KINGSLAND MACY, DOMINICK F. MAURILLO, WELLS V. MOOT, JOHN P. MYERS, ROGER W. STRAUS, and WILLIAM J. WALLIN as members of the Board of Regents and HAROLD R. BARNES, F. EARLE CUSHING, HAROLD J. FISHER, LELAND D. LYON, and CLARENCE C. ROGERS as members of the State Board of Examiners in Optometry,
Appellees.

On Appeal from the Court of Appeals of the State of New York

OPPOSITION TO MOTION TO DISMISS

Appellees have filed a Motion to Dismiss, but have refrained from uniting therewith a motion to affirm. This election evidently flows from a recognition that if this Court has jurisdiction, it must surely reverse the decision below.

Appellees have not even deigned to cite, let alone distinguish, *Saunders* v. *Shaw*, 244 U.S. 317, a decision of this Court with which the decision below is in direct and irreconcilable conflict. Appellees do not—for they cannot—deny that the judgment below deprived Appellants of their day in Court guaranteed by the Fourteenth Amendment as construed in *Saunders* v. *Shaw*, *supra*. Instead, Appellees have filed three technical peripheral objections to the Court's jurisdiction, none of which has any merit.

1. The first two of the technical objections raised by Appellees have been denominated as: "The Judgment rests on an adequate non-Federal basis" and the appeal fails to "present a substantial Federal question." While these headings are adapted from the grounds set forth in the Rules, they have little relationship to the actual discussion in Appellees' Motion. Moreover, the content of Appellees' discussion is internally inconsistent.

Plainly, the argument that the judgment rests on an adequate state ground cannot be made simultaneously with the argument that the federal question presented is insubstantial. Since Appellees concede that there *is* a federal question—whatever may be Appellees' opinion as to its substantiality—the federal question must necessarily be decided in disposing of the case, and it cannot therefore be claimed that the decision below rests on an adequate non-Federal basis.

The existence of a federal question is made plain by Appellees themselves. At page 13 of their Motion, they state:

> "In affirming the intermediate Court, which, in turn, affirmed the Official Referee below, the

> Court of Appeals in effect stated that the purported Federal question was no longer open to argument, having been settled by the United States Supreme Court * * *."[1]

The very fact that Appellees argue that the question is governed by decisions of this Court [citing *Williamson* v. *Lee Optical Company*, 348 U.S. 483, and *Semler* v. *Oregon Board of Dental Examiners*, 294 U.S. 608] dealing with the validity of state regulation under the Federal Constitution, is plain recognition that the basis of the decision below is necessarily federal.

In fact, there are two federal questions presented by this appeal: one relating to the discriminatory nature of a regulation directed only against optometrists of all those whose work is with the human eye; and the other relating to the arbitrary denial to Appellants of any opportunity to be heard respecting the amended regulation.

Appellees, in their Motion, have addressed themselves only to the first of these questions.[2] While hardly clear, their position appears to be that the point was either abandoned or waived by Appellants sometime while this case was before the Court below. There is nothing in the record to support this startling

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[1] Likewise, at page 10 of their Motion, Appellees reluctantly admit:

> "... we suppose, technically, the decision of the Court of Appeals confirmed the findings of the Appellate Division (although no reference is made to this constitutional problem in the Court of Appeals decision) when it confirmed the order as made by the Appellate Division."

[2] The second of the questions is discussed by Appellants, *infra*, at pp. 5-6.

contention. There is not one record reference in the paragraphs on pages 6 to 8 of Appellees' Motion where this point is made; and no such reference is possible. Appellees' assertions consist entirely of conclusionary and unsupported statements *dehors* the record. These assertions are purely unilateral and self-serving; they have been subjected to no trial or test of relevance or truth. This Court should not give any consideration to such statements and should not countenance any procedure by which the facts of record are disregarded or unilaterally amended.

2. As their third technical objection, Appellees contend that the notice of appeal did not comply with Rule 10 (Motion to Dismiss, page 14). In making this contention, Appellees fail to mention that the portions of the record to be certified were *designated by written stipulation* of the parties. Moreover, Appellees do not claim that there is a dispute with regard to the contents of the certified record, for there is none; and they could hardly raise such a dispute at this late date in view of their stipulation.[3] Similarly Appellees failed to mention that they received actual prompt notice of the questions presented, and in fact argued them, on July 23, 1957, in their Opposition to the Application for Stay. The record is clear, therefore, that Appellees received the notices as to the record and the questions presented which Rule 10 was designed to afford; and Appellees, in their Motion, have made no claim to the contrary.

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[3] Rule 12.3, Revised Rules of this Court, permits the parties by stipulation to correct or change the original notice, by providing that when there is a difference between the designation in a stipulation and the designation in a notice of appeal, "the designation in the stipulation shall prevail."

Appellees have not alleged that any technical defects have in any way disadvantaged them. There is no reason on this record to hold that Appellees have presented any justification for dismissal of the appeal.

3. Appellees have offered no reply to Appellants' principal contention on this appeal that "The action of the Court below, sustaining the validity of the amended regulation without ever having afforded Appellants any opportunity to be heard thereon, clearly contravened the Fourteenth Amendment under the directly applicable decision of this Court in *Saunders* v. *Shaw*, 244 U.S. 317." (Jurisdictional Statement, p. 9).

No purpose would be served by repeating here the discussion of this issue set forth in the Jurisdictional Statement (pp. 9-12) on this issue. It is noteworthy, however, that even the unsupported and improper assertions of Appellees clearly recognize as plain and undisputable that the procedure below was highly irregular and that Appellants have never had their day in court. Appellants had been given no opportunity to present evidence as to the validity of the amended regulation, or as to both procedure and substance, under State as well as Federal law.

The principle established by this Court continues to be that "when the act complained of is the act of the [State] supreme court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here." *Saunders* v. *Shaw*, *supra*, at 320. These words, and that decision, of this Court

are precisely in point. Appellees' Motion is nowhere more eloquent or persuasive than in its utter failure to mention *Saunders* v. *Shaw*.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Jurisdictional Statement, it is respectfully submitted that Appellees' Motion to Dismiss should be denied, and that this Court should reverse on the serious and obvious violation of the Fourteenth Amendment by the Court below, upon the authority of *Saunders* v. *Shaw*, 244 U.S. 317.[4]

Respectfully submitted,

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[4] If for any reason this Court should conclude that proceeding by appeal was inappropriate, it may nevertheless, by treating the papers on appeal as a petition for certiorari pursuant to 28 U.S.C. § 2103, take the action appropriate to this case.